The Bar Council

Procedure Select Committee
Inquiry into sub judice resolution in the House of Commons
Bar Council written evidence

About Us

The Bar Council represents approximately 18,000 barristers in England and Wales. It is also the Approved Regulator for the Bar of England and Wales. A strong and independent Bar exists to serve the public and is crucial to the administration of justice and upholding the rule of law.

Scope of Response

This submission addresses the questions upon which the Committee has sought evidence in so far as it is within our expertise.

Executive Summary

1. The Bar Council welcomes the Committee's timely and important inquiry into the sub judice resolution (resolution). The resolution is directed at and intended to preserve comity between the courts and the House, to avoid Parliament influencing, or appearing to attempt to influence the outcome of court proceedings. It also prevents Parliament acting as an alternative forum for resolution of matters that are before the courts. However, in recent years, there have been rising concerns over the applications and effectiveness of the resolution. In this submission, we suggest:
    a. There is a need for expanding and clarifying the positions of parliamentarians and other interested parties who are seeking to influence outcomes in the justice system through the resolution.
    b. The Contempt of Court Act 1981 (1981 Act) and the sub judice resolution, seek the same end but are significantly different. Both regimes ought to better correspond to ensure that any conduct inside or outside of Parliament holds the same consequence of contempt.
    c. In our response to the Law Commission consultation on contempt of court, we have suggested that any departure from the general and flexible rule of standing in judicial review proceedings in England and Wales needs to be carefully justified. The sub judice rule ought to be applied consistently in respect of all matters which would be sub judice for the purpose of the 1981 Act or common law.
    d. The practice of courts has been affected by resourcing pressures and an increasing backlog of cases in the criminal and civil justice systems. We do not accept the premise suggested in this consultation that there is an increased use of judicial review which may have affected the structure or practice of the courts since 2001, and so the application of the resolution. To the consultation question raised about the concern of what is often referred to as judicial overreach that may once have been seen as

properly or exclusively within the power of the executive, we endorse the Independent Review of Administrative Law findings.

e. We do not believe parliamentary privilege should be further curtailed.

f. Domestic and international legal developments, and their impact on the sub judice resolution should remain under review.

Operability of the sub judice resolution

Question 1: In its current form, does the design, operation and application of the sub judice resolution continue to strike the right balance between restricting Members from addressing matters of public interest and avoiding impact on live judicial proceedings?

2. The sub judice resolution is often reduced to a mere expression of "comity" between the Legislature and the Judiciary. However, it is of fundamental constitutional, institutional, and practical importance:

    a. Constitutional: The resolution preserves the separation of powers between Legislature (and, in practice, Executive, since the latter exerts substantial control over the former) and Judiciary. Just as the Judiciary refrains from commenting on or interfering with matters which are properly the constitutional preserve of Parliament, so it is right that legislators refrain from interfering in the Judiciary's constitutional sphere.

    b. Institutional: Parliament, as an institution, is not designed to deal with the matters that come before the courts, and vice versa. The two institutions fulfil entirely different functions. The sub judice resolution is part of a network of conventions which ensure that each institution focuses on the role for which it is designed.

    c. Practical: The courts[1] deal with the rights of individuals in a direct way. It is, for the reasons set out above, unlikely that Parliamentarians will have the same resources or insight into sub judice matters (simply by virtue of not having access to the full evidence or time to digest it). It is almost inevitable, therefore, that comments by parliamentarians will be, at best, based on a partial understanding of a sub judice case.

3. Instances have occurred, in recent years, of parliamentarians blurring constitutional boundaries and making public comments on the courts and parties appearing before them[2]. A strong sub judice resolution is important. The resolution, as currently drafted, broadly addresses the appropriate circumstances. However, it is worth noting is that it contains an unlimited and unaccountable power for the Speaker to waive the rule.

4. Any future amendment to the resolution might include a list of a material considerations that the Speaker should take into account before exercising the waiver power, such as:

    a. The rights of the parties to the relevant sub judice matter (including human rights, fundamental constitutional rights, and other legal and moral rights) and how these will be impacted by waiver.

    b. The constitutional, institutional, and practical propriety of waiver;

[1] 'The Courts' encompasses not only Criminal and Civil Courts but also tribunals and quasi judicial bodies.

[2] Cf. APPG on Democracy and the Constitution "An Independent Judiciary – Challenges Since 2016", 8 June 2022

c. The constitutional importance of maintaining a separation of powers and functions between the Legislature and Judiciary and how this might be impacted by waiver;

d. The public interest in having the matter raised in Parliament, weighed against the public interest in maintaining the separation of powers and functions.

5. One area in which the resolution arises more commonly, is in planning, in particular with respect to the Planning Inspectorate (PINs) which conducts appeals under the Town and Country Planning Act 1990 (against refusals of planning permission by local planning authorities) and Examining Authorities conducting examinations under the Planning Act 2008 in respect of Development Consent Order applications for Nationally Significant Infrastructure Projects.

6. The proceedings conducted by PINs (whether in written form; by hearing or full public inquiry) are founded in the Franks principles[3] of openness, fairness, and impartiality in the decision making processes with the wider public given the opportunity to make representations about the schemes being considered, as well as statutory bodies and consultees and not simply those directly involved (in other words the proposed developer and the local planning authority either as the original decision maker or as an Interested Party).

7. During the conduct of planning related appeals and examinations, it is frequently the case that MPs make representations to the Planning Inspectorate on behalf of their constituents, albeit acknowledging that the final determination is by the Secretary of State or by PINs on their behalf. There is always a period for determination following the end of an appeal or examination proceedings and this period can sometimes be a considerable, one of many months or even a year. It is the operability of the resolution during this determination period that the Bar Council considers needs greater clarity.

8. Matters of future development are often of significant public as well as political interest, and the application as well as the appeal process ensures that the public can seek to influence and present evidence and argument both for and against the consenting of such schemes. However, it is important for all concerned, for probity and fairness that there is a clear end to the evidence stage when representations may be made, and that there are no attempts to interfere with or influence the final determination by the Secretary of State or their Planning Inspector after the end of that period. The sub judice resolution should operate here effectively to ensure this occurs.

9. There have been recent notable instances where the actions of MPs during this determination period have brought into question the lawfulness of the Secretary of State's ultimate decision in respect of a scheme. In one such instance the decision was quashed and in the other it was not.

10. In *Broadview Energy Developments Ltd v Secretary of State for Communities and Local Government and Ors* [2016] EWCA[4] Andrea Leadsom MP made a series of representations against a proposed onshore windfarm both before, during and after the close of the public inquiry (which itself was a redetermination following an earlier decision by an inspector to allow the appeal against the refusal of permission by the local authority). During the course of this redetermination, the decision was called in for the Secretary of State's decision.

[3] Hansard HC Deb. (31 October 1957). vol. 575 col. 401

[4] [2016] EWCA Civ 562.

11. The planning inquiry had ended in October 2013, and the inspector duly reported to the Secretary of State in April 2014 recommending that the appeal be allowed and permission be granted. The Secretary of State however disagreed and determined to refuse to allow permission in December 2014. The developer challenged this decision initially on the basis of Rt Hon Dame Andrea Leadsom MP representations prior to and throughout the application and appeal processes. During the challenge proceedings, the developer however made a freedom of information request and discovered a number of representations to the Secretary of State and the Chief Planning Adviser also made by Mrs Leadsom.

12. It was acknowledged by the Court of Appeal of Mrs Leadsom that "Throughout her career she has been active in campaigning against onshore wind farms. The proposed development in her constituency therefore became a matter of particular concern to her. She had continually objected to the proposal and had successfully campaigned for the Secretary of State to 'call in' the application.".[5]

13. Reference was made to the DCLG (now known as Ministry of Housing, Communities and Local Government) issued Guidance on planning propriety which has since been updated in 2021 to be the Guidance on planning propriety: planning casework decisions. This states that it "provides clarity about how to ensure the transparency and propriety of important decisions, and Ministry of Housing, Communities and Local Government's (MHCLG)". It "deals specifically with planning casework decisions which come before planning ministers in the form of called in planning applications (where the Secretary of State makes a decision instead of the local planning authority) or recovered appeals (where the Secretary of State makes a decision instead of a Planning Inspector)"as well as other planning related matters such as Compulsory Purchase Orders. It is directed for the most part at planning ministers. It also confirms it "does not compete with or depart from the wider principles of the Ministerial code and Civil service code and the Seven principles of public life"[6]

14. With regard to other MPs, the guidance on planning propriety from MHCLG advises:

    a. "55. MPs, like other parties, may express views about planning casework proposals. Where their comments are material to the planning merits of the decision, they will be taken into account in the same way as other evidence. The same principles of transparency apply to MPs as other parties and MPs should not seek to lobby planning ministers privately. As stated in paragraph 20, representations can only be taken into account if they can also be made available to all interested parties for comment.

    b. 56. If approached by an MP, a planning minister should explain that it would not be appropriate for them to comment on or discuss a planning case that is with the department, PINS or ministers, and advise the MP how they should make their representation through the formal channels, as set out in Scenario 2 of this guidance. This applies to approaches in formal settings, e.g. meetings, as well as informal."[7]

15. The Court of Appeal on the facts concluded that Mrs Leadsom's representations within the House of Commons, albeit outside the chamber itself (via the tea room), did amount to breach of natural justice but that in the specific circumstances was only a technical breach

[5] [2016] EWCA Civ 562, para 8.

[6] MHCLG, "**Guidance on planning propriety: planning casework decisions**", retrieved 29 July 2025

[7] Ibid.

and that because of the nature of these representations which essentially were "repetitive of submissions already" made did not justify quashing the Secretary of State's decision.

16. By contrast, in early 2020, representations made prior to the decision of the then Secretary of State for Housing, Communities and Local Government, The Rt Hon. Robert Jenrick MP, to grant permission following a called in application for the development of Westferry Printworks, were accepted as rendering that decision as unlawful. These representations were made by the relevant developer not an MP and made at a social event outside of Parliament. It was conceded that the specific issue raised regarding the timing of a decision was material and was taken into account.

17. The sub judice resolution is directed at comity between the separate decision making processes of the courts and the House, and less about probity of decision making where the quasi judicial process involves decision making by Secretaries of State. There is guidance provided to MPs and ministers about the latter aimed at ensuring probity of decisions, nevertheless there is the need for expanding or clarifying the position of MPs and other interested parties seeking to lobby through MPs via the resolution. We therefore welcome the Committee's review of the resolution.

Question 2: The risk of prejudicing court hearings is regulated outside of Parliament by the Contempt of Court Act 1981, and inside Parliament by the sub judice resolution. Are the two regimes working in tandem effectively? Should they be aligned to a higher or lower degree?

18. The two regimes, the Contempt of Court Act 1981 (1981 Act) and the sub judice resolution, seek the same end but are significantly different. The 1981 Act contains more detail, seeking to make clear the circumstances where a potential contempt may take place, whereas the sub judice resolution is much briefer, permitting a greater degree of interpretation to the Speaker or House authorities. For example, the 1981 Act contains a detailed Schedule 1 which sets out the definitions for active proceedings while the resolution, in contrast does the same job in a few paragraphs.

19. It is comparatively rare for the Attorney General to bring proceedings for contempt of court owing under the 1981 Act for publication. Examples include *AG v MGN Ltd [2011] EWHC 2074 (Admin)* (the Joanna Yeates murder where her innocent landlord was unlawfully implicated by the tabloid press) and *AG v Conde Nast Publications Ltd [2015] EWHC 3322 Admin* (the phone hacking trial). But ordinarily, several steps must first take place before separate proceedings will begin. In criminal cases, the trial judge may grant an application under section 4 of the 1981 Act and order reporting restrictions where publication of an event may prejudice ongoing or future proceedings. In addition, a trial judge may take steps to address the consequences of a contempt contemporaneously, for instance by giving the jury appropriate directions.

20. As for parliamentarians' breaches of the resolution, they have tended to be in different cases than those published by the media and prosecuted for contempt of court. In the main, the breaches have not concerned criminal cases, but instead civil cases.

21. Former MP Peter Hain admitted breaching the sub judice resolution on three occasions since 1991 and also named Philip Green as being the applicant for an injunction to protect his public reputation against claims of bullying and sexual harassment[8]. Various further breaches took place in the 2010s with the naming of litigants concerned in super injunction

[8] Hansard HL Deb. (25 October 2018). vol. 793 col. 987.

litigations. In 2019, during a speech at the 21st Commonwealth Law Conference, the then Lord Chief Justice, the Rt Hon. the Lord Burnett of Maldon, described the concerns of the judiciary as a "rare instance since the 1970s when parliamentarians have spoken in parliament in ways that have failed to respect the principle of comity and have not let the courts free to administer justice".[9]

22. Overall disclosures within Parliament have serious effects on privacy, the rule of law, and the separation of powers. Anyone who has had their anonymity breached will ordinarily have no remedy available from the courts.

23. Consequently, the two regimes can be seen to work effectively and in tandem only when those who would seek to circumvent them, share a common underlying aim. The principle of comity between courts and Parliament ought to be encouraged and fostered. We recommend that the two regimes ought to better correspond. This would make clear that any conduct that takes place inside Parliament would have been an imprisonable contempt if it had taken place outside.

Question 3: Is the present distinction between how the sub judice resolution operates in relation to criminal cases and to civil cases effective?

24. The sub judice resolution is most often breached in relation to civil cases, rather than criminal. A distinction between the two different types of litigation is useful and replicated within the 1981 Act, in far greater detail. But the resolution has not yet been made sufficiently effective so as to prevent breaches in relation to civil cases. The remedy would be to align the regimes as set out in question 2 above. This would bring much greater clarity to those parliamentarians who seek to breach the resolution that their conduct would amount to contempt, punishable by imprisonment, if repeated outside Parliament.

Legal developments since 2001

Question 9: Has the structure or practice of the courts since 2001 (for example, an increasing role for Tribunals; increased use of judicial review etc.) changed in ways which have affected how the sub judice resolution is or should be applied?

25. Outside the criminal and civil courts, there are many tribunals which exist and have been created in relatively recent times which would bring matters within their jurisdiction within the scope of the Contempt of Court Act 1981, the common law of contempt, and therefore the sub judice resolution. The Law Commission has posed questions in its consultation on contempt of court on this very issue and the Bar Council has suggested that any departure from the general and flexible rule of standing in judicial review proceedings in England and Wales needs to be carefully justified.[10] The sub judice resolution ought to be applied consistently in respect of all matters which would be sub judice for the purpose of the 1981 Act or common law.

26. There ought also to be clarity as to the status of those matters which are the subject of an independent or statutory inquiry, although these are the very matters which parliamentarians are likely to want to debate and discuss but the sub judice resolution does not or ought not to apply at all. Recent inquiries include the Covid Inquiry, Infected Blood

[9] The Rt Hon. The Lord Burnett of Maldon "Parliamentary Privilege – Liberty and Due Limitation", 9 April 2019

[10] Bar Council, Response to the Law Commission's consultation on contempt of court, November 2024

Inquiry, and Post Office Inquiry, which gives a vivid illustration of the undesirability of imposing any form of embargo in Parliament.

27. The practice of courts has been affected by resourcing pressures and an increasing backlog of cases in the criminal and civil justice systems. Justice has often moved very slowly indeed, meaning that cases are formally sub judice for many years longer than would once have been the case. Of course, that also includes the time taken to hear appeals arising, also subject to significant delays that render the time limits required for the bringing of the claims themselves disproportionate by comparison.

28. The Bar Council does not accept the premise in this question that there is an increased use of judicial review which may have affected the structure or practice of the courts since 2001, and in turn which affected how the resolution is or should be applied. This is in light of the assessment, findings, and recommendations of the Independent Review of Administrative Law (IRAL) conducted in 2020 to 2021 which noted an exponential increase in judicial review claims being made to the courts since the 1970s but that "the most recent evidence shows that it is at a similar level to that recorded in the mid 1990s (i.e. between 3,000 and 4,000)" and that there was "also evidence that claims are decreasing" [4.74].[11]

29. To the question raised about the concern of what is often referred to as judicial overreach into matters that may once have been seen as properly or exclusively within the power of the Executive, IRAL also considered these arguments and reviewed the relevant caselaw. It noted in the introduction of its report: "The two most potent accountability mechanisms in our contemporary system of governance are also our two most authoritative constitutional institutions: Parliament and the courts" and conclusioned [11-15] "that the relationship between the Judiciary, the Executive and Parliament will from time to time give rise to tensions ... there is a continuing need for respect by judges for Parliament [which] is rendered easier where there is evidence of real parliamentary scrutiny ... Respect should be based on an understanding of institutional competence. Our view is that the government and Parliament can be confident that the courts will respect institutional boundaries in exercising their inherent powers to review the legality of government action. Politicians should, in turn, afford the Judiciary the respect which it is undoubtedly due when it exercises these powers."[12]

30. The Bar Council endorses these findings, and this is reflected in the effective operation of the resolution.

Question 10: Is it appropriate that the sub judice resolution does not apply to final injunctions? Is there a different between interim injunctions and those that are no longer subject to ongoing proceedings?

31. The purpose of the sub judice resolution is to avoid interference by Parliament into ongoing court proceedings. It bears upon parliamentary privilege by delaying discussion about the substance of proceedings or their conduct until concluded. Were the rule to be extended so as to apply to final injunctions it would further limit the ability of Parliament to carry out necessary debate in the public interest.

32. Debate during live proceedings has the potential to influence the conduct of, participation in and outcomes of those proceedings, which would be impermissible interference by

[11] The Independent Review of Administrative Law, March 2021

[12] Ibid.

Parliament into the independent judicial process. But discussion after the event is a necessary and appropriate part of the constitutional structure, which respects both the independence and importance of the courts and Parliament.

33. A parliamentarian may rely on parliamentary privilege to reveal information which is subject to an injunction. Even though courts grant injunctive relief only after having considered the relevant evidence and principles (for example giving effect to the Article 10 right to freedom of expression where this is engaged), there may be circumstances in which it is in the public interest for a parliamentarian to reveal this information, and/or for Parliament to debate those matters. We do not believe parliamentary privilege should be further curtailed (including by an extension of the sub judice resolution) to limit the ability of a parliamentarian to raise such issues.

Question 11: Could the Law Commission's proposals for reform of the Contempt of Court Act 1981 have any implications for the sub judice resolution?

34. The Law Commission's proposals[13] in relation to when proceedings are active will have an effect on the interpretation of the resolution. The Law Commission proposes that criminal proceedings should continue to be considered active from the point of arrest whereas the resolution does not consider criminal proceedings to be active until a charge has been made (or equivalent). This leaves a loophole because when criminal proceedings cease to be active, the Law Commission's proposals would not affect the resolution.

Question 12: Are there any additional domestic legal developments since 2001 which have impacted the interpretation or application of the sub judice resolution?

35. The main legislative provisions impacting this area which concern contempt of court, are currently the subject of a Law Commission consultation, supplementary consultation and review as referenced in question 11 above. The wording of the resolution will most likely need to be reviewed in any event further to any changes to the domestic law governing contempt of court to ensure consistency and to consider whether it remains fit for purpose having regard to any amendments or new legislation in this regard.

36. Contempt of court is a common law doctrine largely codified by the 1981 Act and the act of an MP discussing a matter which is formally sub judice in Parliament is more likely to be covered in principle by the Act than by the common law of contempt. As such, developments in the common law do not really affect the position of MPs in this regard.

37. The Bar Council is not aware of any attempted, let alone successful prosecution of an MP (since 2001 or at all) for contempt of court, whether under the strict liability provisions contained in the 1981 Act or otherwise, for discussing a case that is sub judice in Parliament in a way said to interfere with the administration of justice. This is no doubt because of the immunity of MPs arising from Article 9 of the Bill of Rights 1689.

38. The application of the flexible sub judice resolution in Parliament is a voluntary restriction which has no parallel outside the privileges of Parliament. Furthermore, as the more important work of parliamentarians is to discuss legislation, and this falls out with the resolution, there is little scope for domestic legal developments in the field of contempt of court to affect its interpretation or application.

[13] Law Commission, Contempt of Court Consultation Paper, 9 July 2024

39. One area which is of obvious connection and interest, however, is the question of when a matter is in fact sub judice. In criminal matters, proceedings are active when charges are brought until the time when the proceedings are concluded by a verdict or sentence or discontinuation. However, this is a more complicated question in civil cases. The sub judice resolution treats civil proceedings as active from the time when arrangements are made for a hearing to the judgment or discontinuance of the matter. However, it is widely understood that there can be a very substantial delay between the time of a claim being issued and arrangements being made for a hearing. The current backlogs in the courts and tribunals are likely to exacerbate the position.

Question 13: Should any international legal developments – including, but not limited to, the European Court of Human Right's judgment in *Green v United Kingdom* – be taken into account in the application of the sub judice resolution?

40. International legal developments of relevance to the application of the resolution include decisions of the European Court of Human Rights (ECtHR) which bind the UK as a matter of international treaty law, and practice of other jurisdictions that may be instructive.

European Court of Human Rights decisions:

41. Since the House of Commons passed its sub judice resolution in 2001, the ECtHR has ruled on numerous complaints relating to speeches made in national legislatures that were alleged to have impacted fair trial rights. Three cases originating in the UK are instructive as to how the court approaches parliamentary privilege and its broader case law provides concrete guidance on how the presumption of innocence in criminal cases could apply to statements made in parliamentary debate.

Parliamentary privilege and the broad function of the sub judice resolution

42. The three ECtHR cases involving the UK and parliamentary privilege are:
    a. *A v UK*[14] regarding statements of former MP Mr Michael Stern on 17 July 1996 which accused a named individual of anti-social behaviour, resulting in media coverage and threats and abuse directed at the individual.
    b. *Zollmann v UK*[15] regarding statements of former MP and now Lord Peter Hain, on 17 February 2000, alleging named individuals' involvement in selling diamonds for a sanctioned Angolan militia, resulting in the individuals being investigated by European police authorities.
    c. *Green v UK*[16] regarding statements of Lord Hain on 25 October 2018 naming an individual who had used nondisclosure agreements (NDAs) while settling claims of workplace harassment, where the Court of Appeal had granted an interim injunction two days earlier preventing disclosure of the individual's identity.
43. The individuals affected by these statements challenged the operation of parliamentary privilege under Article 9 of the Bill of Rights 1689 as a limitation on their right of access to a court under Article 6 of the European Convention on Human Rights (ECHR), and as an unjustified interference with their right to private and family life under Article 8 ECHR. In all these cases, the ECtHR took the view that parliamentary privilege, operating as an

[14] *A v UK (*Application no. 35373/97), judgement of 17 December 2002.

[15] *Zollmann v UK (*Application no. 62902/00) admissibility decision of 27 November 2003.

[16] *Green v UK* (Application no. 22077/19), judgment of 8 April 2025.

absolute bar to legal challenges for statements made in either House, does not violate the ECHR. The court sees parliamentary privilege (a feature that it notes is present in most States Parties to the Convention) as pursuing the legitimate aims of protecting free speech by elected representatives and maintaining the separation of powers between legislature and judiciary.[17] It accordingly gives States a broad margin of appreciation on this, and considers domestic legislatures to be better placed to strike a fair balance.

44. The resolution was expressly relevant in *Green v UK*, insofar as the ECtHR regarded the resolution as a safeguard which, among other factors, warranted according to wide deference to the legislature. It noted in particular the requirement in the House of Lords to give the Lord Speaker 24 hours' notice of a proposed statement (even though in this case Lord Hain did not comply with the 24-hour requirement, or otherwise give advance notice of the content of his statement)[18]. It also noted that the Commissioner for Standards could investigate alleged breaches of standards (albeit not actually breaches of the sub judice resolution),[19] and that (as confirmed in *R v Chaytor*) the scope of parliamentary privilege is ultimately for the courts to decide.[20]

45. It was also relevant that while almost all European states have parliamentary privilege, only the parliaments of three states (the UK, Ireland and, to a certain extent, Serbia) have some form of a sub judice resolution. In Ireland, a parliamentary committee has powers to review and sanction breaches of the sub judice resolution, and in Serbia the parliamentary code of conduct governs what can be said about ongoing criminal proceedings, and can be relied on by individuals to file a complaint. The ECtHR did not regard these controls as notably stronger than those applying in the UK.

46. *Green* was an example of an interim injunction being frustrated by the use of parliamentary privilege. The ECtHR placed importance on the fact that the UK Parliament is aware of this problem and has addressed the need for further controls. It noted that in 2011-2012, a parliamentary Joint Committee on Privacy and Injunctions examined whether there was a risk of privilege being abused to frustrate injunctions. The ECtHR determined that the risk was not such as to warrant imposing controls on parliamentary speech. However, the court "consider[ed] that the need for appropriate controls must be kept under regular review at the domestic level."[21] It is possible that if there arose a rampant practice of abusing privilege to circumvent injunctions, the ECtHR would expect consequences within the UK Parliament for breaches of the resolution (for instance treating it as contempt of the House as New Zealand has done).[22] Failing which it might itself step in if and when the practice was challenged before the ECtHR.

<u>Parameters and operation of the sub judice resolution in criminal cases</u>

47. ECtHR case law is likely to have more of a practical impact on the operation of the resolution in relation to criminal proceedings. For instance, the complainant in *Zollmann* challenged an MP's statement as infringing the right to the presumption of innocence under Article 6(2) of

[17] *A v UK* (Application no. 35373/97), judgement of 17 December 2002, para 77.

[18] House of Lords Commissioner for Standards, *The conduct of Lord Hain* (April 2019), p24-25.

[19] *Green v UK* (Application no. 22077/19), judgment of 8 April 2025, para 85.

[20] [2010] UKSC 52, paras 15-16.

[21] *Green v UK* (Application no. 22077/19), judgment of 8 April 2025, para 92.

[22] Office of the Clerk of the House of Representatives (NZ), submission to UK Parliamentary Privilege consultation, 1 October 2012

the ECHR. The ECtHR addressed this argument substantively, rather than citing the margin of appreciation or parliamentary privilege. It found:

a. "Article 6 § 2, in its relevant aspect, is aimed at preventing the undermining of a fair criminal trial by prejudicial statements made in close connection with those proceedings At the time that Mr Peter Hain made his statement in the House of Commons, it is not apparent therefore that there was any pending or intended criminal investigation about a prosecutable offence within the United Kingdom, of which his statements might be regarded as prejudging the outcome."[23]

48. Unlike our own courts, the ECtHR is not bound by Article 9 of the Bill of Rights 1689. It is not prohibited from impeaching or questioning speech in a national parliament where it amounts to an interference with the ECHR. In a sufficiently clear case where an MP's speech flagrantly undermined the fairness of a criminal trial, the ECtHR could conceivably find that the MP or Parliament violated Article 6(2) ECHR. In fact, it has done so. In *Konstas v Greece*,[24] it held that statements made by two ministers in parliamentary debates about the guilt of individuals with pending appeals violated Article 6(2) ECHR (the issue of parliamentary privilege does not seem to have arisen, even though Greek MPs do enjoy such privilege under domestic law).
49. The ECtHR's case law creates the following implications for the way the resolution operates:
    a. Article 6(2) ECHR covers "statements made by other public officials about pending criminal investigations which encourage the public to believe the suspect guilty and prejudge the assessment of the facts by the competent judicial authority."[25]
    b. The Court is likely to interpret criminal proceedings as beginning earlier than the sub judice resolution envisages, and not simply when formal charges are brought but "from the moment that an individual is officially notified by the competent authority of an allegation that he has committed a criminal offence, or from the point at which his situation has been substantially affected by actions taken by the authorities as a result of a suspicion against him."[26] This is likely to equate to an individual being arrested.
    c. Public authorities have a right to inform the public about crime and ongoing investigations. This is an aspect of freedom of expression under Article 10 ECHR. However, they must do this "with all the discretion and circumspection necessary if the presumption of innocence is to be respected."[27]
    d. Naming the individual suspected of wrongdoing may be justifiable in cases where the target of investigation is a public office holder. It is far less clear when a private citizen under criminal investigation or trial can justifiably be named.
    e. Choice of words is critical: "[a] fundamental distinction must be made between a statement that someone is merely suspected of having committed a crime and a clear

[23] *Zollmann v United Kingdom* (Application no. 62902/00), admissibility decision of 27 November 2003, p10-11.
[24] *Konstas v Greece* (Application no. 53466/07), judgment of 24 May 2011.
[25] *Ismoilov v Russia* (Application no. 2947/06), judgment of 24 April 2008, para 161.
[26] *Larrañaga Arando v. Spain* (Application no. 73911/16), admissibility decision of 18 July 2019, para 40.
[27] *Peša v. Croatia* (Application no. 40523/08), judgment of 8 April 2010, para 139.

declaration, in the absence of a final conviction, that an individual has committed the crime in question."[28]

f. The presumption of innocence remains relevant even after conviction, where an appeal is pending: in *Konstas*, mentioned above, Article 6(2) ECHR was found to be violated by parliamentary statements that went beyond simply mentioning the fact of someone's conviction and amounted to "a new assessment of the facts the Court of Appeal would be examining in order to deliver the final decision in the matter," and words "likely to give the impression that the Minister of Justice was satisfied with the verdict … and wanted the Court of Appeal to uphold that judgment."

g. *Zollmann* might mean that parliamentarians need to avoid prejudicing international criminal investigations and trials in addition to domestic ones in order to comply with the ECHR.[29]

50. The present review was called for by the Speaker of the Commons on 21 January 2025 in response to apparent frustration by members of the House that ongoing prosecutions limited their ability to discuss the case of the Southport attack and ensuing public disorder in summer 2024. However, we respectfully submit that the debates in the aftermath of the attack and disorder as well as after the Southport accused pleaded guilty (summarised helpfully in the Commons research briefing on the sub judice rule)[30] demonstrate the resolution operating effectively and in a way that would comply with Article 6(2) ECHR. On 30 July, although the case was not technically sub judice under the resolution, the Speaker "urge[d] members to avoid speculating about the guilt or innocence of any person, the identity of the person who has been arrested, or the motive for the attacks." In September the Speaker granted a limited waiver of the resolution to enable members to speak about the disorder in broad terms, but not to "refer to specific individuals who have been charged and are awaiting trial, or engage in any discussion or speculation about individual cases". These instructions are entirely apposite for the protection of Article 6 rights.

51. On 21 January 2025, the Speaker allowed free debate upon the accused's conviction (despite sentencing still pending). There is a risk in this situation that politicians' pronouncements could be seen as influencing the independent judge's decision on sentencing. However, the debate, while expressing the horrific nature of the offence, did not stray into prejudging the sentence (apart from the Home Secretary saying "I can confirm that he will be treated as a terrorist offender in prison" which presumes a custodial sentence, but that is arguably not unreasonable in the circumstances).

52. As to the political and media criticisms that the sub judice resolution was too restrictive on speech in this instance, the question arises whether it could have been applied in a less restrictive way and not fall foul of the ECHR.

53. On 30 July, the Home Secretary referenced the fact that a 17-year-old male had been arrested. We can see no justification for her identifying him by name at that stage. But it is arguable the ECHR would not prevent MPs referencing police statements that the suspect was born

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[28] Ibid at para 141.

[29] *Zollmann*, p. 12: "The Court does not consider therefore that there is any close link, in legislation, practice or fact, established between the statement made in the House of Parliament and any significant criminal procedural steps taken overseas which might be regarded as sufficient to render the applicants "charged with a criminal offence" for the purposes of Article 6 § 2 of the Convention."

[30] Richard Kelly, *The Sub Judice Rule*, House of Commons Library Research Briefing, 6 June 2025

in Cardiff, insofar as this could have helped prevent the spread of disinformation that partly triggered the ensuing violent disorder.

54. In October, when the Southport accused was charged with additional terrorism-related offences (the announcement of which was delayed due to fears it might spark further disorder), opposition MPs claimed a cover-up and/or that the government's earlier view that Southport was not terror related was a lie. The leader of Reform UK complained that he was precluded from asking questions about whether the suspect had been referred to the Prevent scheme.[31] We think the fact of being referred to the Prevent scheme could be a highly prejudicial piece of information to a fact-finder considering terrorism or murder charges. There was a strong argument for not allowing those matters to be discussed while the investigation and trial were ongoing. The failures of the Prevent scheme in relation to the convicted Southport attacker have been explored in depth since the conclusion of the trial.

Practice of other jurisdictions that may be instructive

55. The Irish case of *O'Brien v Clerk of Dail Éireann*[32] (2019) involved a claim that statements made in the Irish Parliament, circumventing an injunction, violated the constitutional principle of access to justice. The claim was dismissed by the High Court (in a highly readable and insightful judgment that is well worth reading), and the Supreme Court upheld the dismissal of the claim. The Supreme Court speculated on the circumstances in which a court might be permitted to override parliamentary privilege under the Irish Constitution:

    a. "even if a[n] exception exists, it could only apply in circumstances where there was cogent evidence that the Houses had abrogated their constitutional duty to have appropriate mechanisms in place. This might, in theory, be capable of being established because of a particularly egregious failure to vindicate the rights of a citizen without any remedial action being taken to ensure that any such failure would not be repeated. In such a case it might be inferred that the Houses truly did not intend to fulfil their constitutional role of protecting the rights of citizens. […] Likewise, persistent and unrectified failures might lead to a similar conclusion."

Question 14: How should any domestic or international legal developments, and their impact on the sub judice resolution, remain under review?

Domestic legal developments

56. UK courts are unlikely to directly rule on the resolution as doing so would be tantamount to impinging upon Parliamentary privilege. There may be domestic court or tribunal decisions about the application and scope of parliamentary privilege, and it would be worth keeping track of these. Cases of this kind are likely to be widely publicised, and in at least once instance a court has solicited the Commons Speaker's Counsel's views on parliamentary privilege in the given case.[33] It would also be useful to keep track of cases applying the Contempt of Court Act 1981's sub judice obligations on the press, as the considerations underpinning restrictions on reporting will be similar to those motivating Parliament's sub judice resolution.

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[31] The Daily Telegraph, "Reform was banned from discussing Southport 'attacker' in Parliament, Nigel Farage reveals", 1 November 2024

[32] [2019] IESC 12.

[33] *R (Project for the Registration of Children as British Citizens)* [2021] 1 WLR 3049.

57. An easy way to keep track of relevant cases is to periodically search the British and Irish Legal Information Institute (BAILII). Search for cases mentioning the phrases "sub judice", "parliamentary privilege", "parliamentary immunity" and "non-accountability" (the last phrase being a term the ECtHR uses). BAILII will include cases from the ECtHR and a number of other jurisdictions.

International legal developments

58. The application of the resolution in relation to criminal proceedings may be informed by ECtHR decisions on public statements that violate the presumption of innocence under Art 6(2) ECHR. Cases may give practical guidance even if they are unrelated to the context of parliamentary proceedings. We would suggest an additional BAILII search to include "presumption of innocence AND statement".

59. The Parliamentary Assembly of the Council of Europe (PACE) could be a useful place to keep track of ECtHR decisions affecting national legislatures, and to exchange insights between nations about balancing free speech in parliament with respect for the courts. The UK Parliament has eighteen MPs/Lords in PACE, and they could be relied upon to gather this knowledge and report back to the Committee. Similarly, the Commonwealth Parliamentary Association could be a useful forum for learning from the experience of other Commonwealth jurisdictions.

International comparison

Question 16: How have other legislatures across the world evolved in their practices in relation to the treatment of similar matters since 2001?

60. We have reviewed and compared the UK's sub judice resolution to the following jurisdictions of Australia, New Zealand, Ireland, and Canada. The following points were noted:

    a. In the UK and New Zealand, the application of the rule is subject to the decision of the speaker.

    b. In Ireland the sub judice rule is maintained through the process of giving notice if members wish to speak about a matter. Similarly to the UK, it is for the speaker to determine whether or not the rule should apply.

    c. Australia has a convention, not a rule and there is a reliance on the discretion of the speaker.

    d. Canada also has a convention, but it is considered to be a 'voluntary exercise of restraint'.

    e. Some jurisdictions are clearer than others about the starting and finishing points for the application of the rule / convention with the UK providing the most clarity on this matter[34].

[34] 1.Cases in which proceedings are active in United Kingdom courts shall not be referred to in any motion, debate or question.
(a) (i) Criminal proceedings are active when a charge has been made or a summons to appear has been issued, or, in Scotland, a warrant to cite has been granted.
(ii) Criminal proceedings cease to be active when they are concluded by verdict and sentence or discontinuance, or, in cases dealt with by courts martial, after the conclusion of the mandatory post-trial review.

f. In each jurisdiction the aim of the sub judice guidance is to balance the needs of natural justice (to ensure the right to a fair trial) with the need of parliament to be able to discuss any matter it may wish to discuss.

g. In all the jurisdictions there is a tendency to rely on the chair or the speaker's discretion as to when the sub judice rule can be waived. Canada's guidance states that 'when there is doubt in the mind of the Chair, a presumption should exist in favour of allowing debate and against the application of the convention'[35].

h. However, there seems to have been little development or change to the rules in any of the jurisdictions.

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(b) (i) Civil proceedings are active when arrangements for the hearing, such as setting down a case for trial, have been made, until the proceedings are ended by judgment or discontinuance.
(ii) Any application made in or for the purposes of any civil proceedings shall be treated as a distinct proceeding.
(c) appellate proceedings, whether criminal or civil, are active from the time when they are commenced by application for leave to appeal or by notice of appeal until ended by judgment or discontinuance.
But where a ministerial decision is in question, or in the opinion of the Chair a case concerns issues of national importance such as the economy, public order or the essential services, reference to the issues or the case may be made in motions, debates or questions.

[35] Rules of Order and Decorum, *The Role of the Speaker*, House of Commons Procedure and Practice (Canada), accessed 29 July 2025